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Superior Court of California,
County of San Francisco

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 **CGC-23-610247**

12 GABRIEL ESPINOZA,

13 Plaintiff,

14 vs.

15 BURLINGTON STORES, INC.,
16 BURLINGTON COAT FACTORY OF
17 TEXAS, INC.,

18 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code § 25249.5 et
seq.)**

19 Plaintiff Gabriel Espinoza (“Plaintiff”), by and through his attorneys, alleges the following
20 cause of action in the public interest of the citizens of the State of California.

21 **BACKGROUND OF THE CASE**

22 1. Plaintiff brings this representative action on behalf of all California citizens to
23 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
24 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,
25 “[n]o person in the course of doing business shall knowingly and intentionally expose any
26 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
27 giving clear and reasonable warning to such individual ...”. Health & Safety Code § 25249.6.

28 2. This complaint is a representative action brought by Plaintiff in the public interest
of the citizens of the State of California to enforce the People’s right to be informed of the health
hazards caused by exposure to lead, a toxic chemical found in Sweet Living mugs, Style #
V691606, sold and/or distributed by defendant Burlington Stores, Inc. and/or defendant Burlington

1 Coat Factory of Texas, Inc. (collectively, “Burlington” or “Defendants” and each a “Defendant”)
2 in California.

3 3. Lead is a harmful chemical known to the State of California to cause cancer and
4 birth defects or other reproductive harm. On October 1, 1992, the state of California listed lead as
5 a chemical known to cause cancer and it has come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 25249.10(b). On February 27, 1987, the State of California listed lead as a chemical known to
8 cause birth defects or other reproductive harm.

9 4. Proposition 65 requires all businesses with ten (10) or more employees that operate
10 within California or sell products therein to comply with Proposition 65 regulations. Included in
11 such regulations is the requirement that businesses must label any product containing a Proposition
12 65-listed chemical that will create an exposure above safe harbor levels with a “clear and
13 reasonable” warning before “knowingly and intentionally” exposing any person to any such listed
14 chemical.

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) to be
17 imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code
18 § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the
19 actions of a defendant which “violate or threaten to violate” the statute. Health & Safety Code §
20 25249.7.

21 6. Plaintiff alleges that Defendants distribute and/or offer for sale in California,
22 without a requisite exposure warning, Sweet Living mugs, Style # V691606, (the “Products”) that
23 expose persons to lead when used for their intended purpose.

24 7. Defendants’ failure to warn consumers and other individuals in California of the
25 health hazards associated with exposure to lead in conjunction with the sale and/or distribution of
26 the Products is a violation of Proposition 65 and subjects Defendants to the enjoinder and civil
27 penalties described herein.

1 a. A warning that appears on a product's label or other labeling.

2 b. Identification of the product at the retail outlet in a manner which provides
3 a warning. Identification may be through shelf labeling, signs, menus, or a combination
4 thereof.

5 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be
6 prominently placed upon a product's labels or other labeling or displayed at the retail outlet
7 with such conspicuousness, as compared with other words, statements, designs, or devices
8 in the label, labeling or display as to render it likely to be read and understood by an
9 ordinary individual under customary conditions of purchase or use.

10 d. A system of signs, public advertising identifying the system and toll-free
11 information services, or any other system that provides clear and reasonable warnings.

12 21. Proposition 65 provides that any "person who violates or threatens to violate" the
13 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase
14 "threaten to violate" is defined to mean creating "a condition in which there is a substantial
15 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil
16 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to
17 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

18 **FACTUAL BACKGROUND**

19 22. On October 1, 1992, the state of California listed lead as a chemical known to cause
20 cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code
21 Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On February 27,
22 1987, the State of California listed lead as a chemical known to cause birth defects or other
23 reproductive harm. In summary, lead was listed under Proposition 65 as a chemical known to the
24 State to cause cancer and birth defects or other reproductive harm.

25 23. The exposures that are the subject of the Notice result from the purchase,
26 acquisition, handling and recommended use of the Product. The primary route of exposure to the
27 is through dermal absorption directly through the skin when consumers use, touch, or handle the
28 Products. Exposure through ingestion will occur by touching the Product with subsequent touching

1 of the user’s hand to mouth. No clear and reasonable warning is provided with the Products
2 regarding the health hazards of exposure.

3 24. Defendants have processed, marketed, distributed, offered to sell and/or sold the
4 Products in California since at least November 7, 2022. The Products continue to be distributed
5 and sold in California without the requisite warning information.

6 25. At all times relevant to this action, Defendants have knowingly and intentionally
7 exposed users and/or consumers of the Products to lead without first giving a clear and reasonable
8 exposure warning to such individuals.

9 26. As a proximate result of acts by Defendants, each as a person in the course of doing
10 business within the meaning of H&S Code § 25249.11, individuals throughout the State of
11 California, including in San Francisco County, have been exposed to lead without a clear and
12 reasonable warning on the Products. The individuals subject to the violative exposures include
13 normal and foreseeable users and consumers that use the Products, as well as all others exposed to
14 the Products.

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 27. Plaintiff purchased the Product from Burlington. At the time of purchase,
17 Burlington did not provide a Proposition 65 exposure warning for lead or any other Proposition 65
18 listed chemical in a manner consistent with H&S Code § 25603.1 as described *supra*.

19 28. The Product was sent to a testing laboratory to determine if, and what amount of,
20 lead would migrate and/or leach from the Product.

21 29. The laboratory provided the results of its analysis. Results of this test determined
22 the Product exposes users to lead (the “Chemical Test Report”).

23 30. Plaintiff provided the Chemical Test Report and Product to an analytical chemist
24 to determine if, based on the findings of the Chemical Test Report and the reasonable and
25 foreseeable use of the Product, exposure to lead will occur at levels that require Proposition 65
26 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California
27 Code of Regulations.

1 39. The Product does not comply with the Proposition 65 warning requirements.

2 40. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since November 7, 2022, continuing until the present, that Defendants have
4 continued to knowingly and intentionally expose California users and consumers of the Product to
5 lead without providing required warnings under Proposition 65.

6 41. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the Product. The primary route of exposure to the
8 is through dermal absorption directly through the skin when consumers use, touch, or handle the
9 Products. Exposure through ingestion will occur by touching the Product with subsequent touching
10 of the user's hand to mouth. No clear and reasonable warning is provided with the Products
11 regarding the health hazards of exposure.

12 42. Plaintiff, based on his best information and belief, avers that such exposures will
13 continue every day until clear and reasonable warnings are provided to purchasers and users or
14 until this known toxic chemical is removed from the Products.

15 43. Defendants have knowledge that the normal and reasonably foreseeable use of the
16 Products exposes individuals to lead, and Defendants intend that exposures to lead will occur by
17 its deliberate, non-accidental participation in the importation, distribution, sale and offering of the
18 Products to consumers in California

19 44. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
20 Complaint.

21 45. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
22 described acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.

23 46. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
24 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants and requests the following relief:

- A. That the court assess civil penalties against each Defendant in the amount of \$2,500 per day for each violation for up to 365 days (up to a maximum civil penalty amount per violation of \$912,000.00) in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin Defendants mandating Proposition 65 compliant warnings on the Products;
- C. That the court grant Plaintiff reasonable attorney’s fees and costs of suit, in the amount of \$50,000.00.
- D. That the court grant any further relief as may be just and proper.

Dated: November 7, 2023

BRODSKY SMITH



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